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No. 06-306

Supreme Court, U.S.
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In The

Supreme Court of the United States

MARIANNE SAWICKI,

Petitioner,

v.

MORGAN STATE UNIVERSITY
and STATE OF MARYLAND,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

THIS CASE PRESENTS AN APPROPRIATE VEHICLE FOR DECIDING THE QUESTION PRESENTED

(1) Respondents do not deny the existence of the inter-circuit conflict described in the petition. They question only the appropriateness of the instant case as a vehicle for deciding that important issue.

In the instant case, MSU's ultimate decisionmakers – the President and VPAA – acted in reliance on the recommendations of and on the basis of information provided by two lower ranking supervisors, the Dean and Chair. The Brief in Opposition suggests that the courts below concluded that there was no evidence that either the Dean or Chair acted with any discriminatory motive. Respondents do not claim, however, that there were any exculpatory findings that actually refer to the Dean and Chair;[1] rather, respondents point to general language in the opinions below, and invite the Court to conclude that the lower courts were referring to the Dean and Chair.[2] In light of

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[1] There are just such express findings in the district court opinion regarding the motives of the President and VPAA. Pet. App. 26a ("Plaintiff's allegations against the President do not raise a reasonable inference of unlawful discrimination by him. . . ."), 29a ("The VPAA's review of Plaintiff's tenure application does not raise a reasonable inference of discrimination.")

[2] The Brief in Opposition contains one less cautiously phrased statement which appears actually to assert that the courts below concluded there was no evidence that *anyone* – which would have to include the Chair or Dean – had ever engaged in any discrimination.

> [A]s both courts below determined, the extensive record developed in this case does not support an inference that Ms. Sawicki was a victim of race or gender discrimination.

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those supposed findings regarding the Dean and Chair, respondents argue, the resolution of the Question Presented cannot "alter the outcome of this case." (Br. Opp. 6).

These arguments do not accurately depict the decisions of the courts below. The lower courts never made any ruling at all regarding the motives of the Dean and Chair; to the contrary, the lower courts – at the urging of respondents – expressly declined to do so, concluding instead that any discriminatory purpose or actions on the part of the Dean and Chair was legally irrelevant. The linchpin of those decisions – and the reason why the Question Presented is of central importance in this case – was the conclusion of the lower courts that under the Fourth Circuit's controlling decision in *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (4th Cir. 2004) (en banc), *cert. dismissed*, 543 U.S. 1132 (2005), any "discriminatory behavior of the Chair and Dean is immaterial." (Pet. App. 24a).[3] The district court expressly did not

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(Br. Opp. 2). The lower courts never made – indeed, were never asked to respondents to make – any such determination regarding the motives of the Chair and Dean.

[3]The Brief in Opposition includes the following statement:

> As examples of alleged discrimination, [petitioner] points to various actions on the part of the Chair and, to some extent, the Dean, the VPAA and the President . . . The district court rejected those arguments. . . .

(Br. Opp. 4). It is clear, however, that the district court rejected those arguments on two distinct grounds. The district court rejected the allegation of discrimination by the President and VPAA for lack of evidence; the court rejected the allegation of discrimination by the Chair and Dean, however, not for want of evidence, but solely because it believed that under *Hill* any discrimination by the Chair and Dean was legally irrelevant.

evaluate the evidence of discrimination on the part of the Chair or Dean, because

> [p]roperly applying *Hill's* actual decisionmaker test to Defendant MSU's multi-tiered tenure application process shelters the alleged discriminatory acts of Plaintiff's immediate supervisors from this Court's analysis. . . .

(Pet. App. 20a).

Respondents state that

> The district court . . . determined that Ms. Sawicki "has not created a triable issue" on whether the University's decisionmakers "acted with unlawful discriminatory animus when they denied her tenure application. . . ."

(Br. Opp. 4). The quoted passage, however, refers only to triable issues of fact regarding the motives of the so-called university "decisionmakers." The district court made absolutely clear that this quoted determination did *not* refer to the claims of discriminatory animus on the part of the Chair and Dean. "Applying *Hill* to these facts, it is clear that only the President and VPAA can be considered the actual decisionmakers. . . . Under *Hill*, neither the Chair nor Dean can reasonably be considered actual decisionmakers." (Pet. App. 21a) (footnote omitted).[4]

Respondents quote the following excerpt from the district court opinion:

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[4] The passage in the district court opinion specifically refers to the lack of a triable issue regarding the "actual decisionmakers" (Pet. App. 32a), a phrase of art under *Hill*. Respondent's paraphrase of the district court opinion omits the term "actual."

> no reasonable juror could find that the circumstances surrounding Plaintiff's tenure denial amount to unlawful discrimination or otherwise conclude that discrimination played a role in the tenure denial.

(Br. Opp. 4, 5) (*quoting* Pet. App. 32a). But this excerpt has been edited to omit the key prefatory language (italicized below), which makes clear that the district judge was applying *Hill*, and thus was referring only to whether discrimination played a role in the actions of the university's President and VPAA.

> *Heeding . . . the recent en banc holding in Hill*, this Court concludes that no reasonable juror could find that the circumstances surrounding Plaintiff's tenure denial amount to unlawful discrimination or otherwise conclude that discrimination played a role in the tenure denial.

(Pet. App. 24a) (emphasis added). In the three sentences that follow this statement, the district court emphasized that because of *Hill* the court would not even consider evidence of discrimination on the part of the Chair and Dean.

> While the Plaintiff alleges innumerable indicia of discrimination, the Court will address only those necessary to resolve the case. Under *Hill's* actual decisionmaker the alleged discriminatory behavior of the Chair and Dean is immaterial if it cannot be imputed to the actual decisionmakers, here the President and VPAA. While Plaintiff's complaint and opposition are brimming with allegations of discriminatory behavior by her immediate supervisors, there is little in the record to suggest that either decisionmaker should have been on notice of either supervisor's allegedly

> disparate treatment of Plaintiff (or any underlying discriminatory animus towards whites or women) at the time they made the[ir] decision. . . .

(Pet. App. 24a-25a).

The courts below did not consider the evidence regarding discrimination by the Chair and Dean for another, equally compelling reason: the summary judgment motion filed by respondents never questioned the sufficiency of the evidence that the Chair and Dean had engaged in invidious discrimination. To the contrary, the central contention of the respondents in the courts below was that it was simply irrelevant whether the Chair or Dean had engaged in discrimination on the basis of race or sex. (See Petition, pp. 6-7 and nn.15-16). Respondents' narrowly framed summary judgment motion did not ask the lower courts to consider, or call upon petitioner to present, evidence regarding the motives of the Chair and Dean. That motion was carefully framed instead to dispute only the sufficiency of the evidence regarding the motives of the President and VPAA. Respondents cannot at this stage in the litigation raise a new fact-bound contention which was never presented to the courts below.[5]

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[5] Although the sufficiency of the evidence of discrimination by the Chair and Dean is not before this Court, just as it was not before the courts below, we note that respondents substantially overstate the assertedly exculpatory evidence.

Respondents suggest that Sawicki had a consistently negative relationship with students. (Br. Opp. pp. i, 2-3). As the district court noted, however, the issue about Sawicki's relations with students was largely limited to a dispute about Sawicki's efforts in a single class to enforce MSU's own rules regarding attendance and eating in the classroom. (Pet. App. 4a). MSU officials had upheld Sawicki's actions in

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This case presents a classic illustration of the ways in which a discriminatory lower ranking supervisor can cause his supervisors to dismiss an employee. The complaint and supporting materials assert that the Chair and Dean provided false adverse information regarding Sawicki, withheld favorable information about her, and recommended a denial of tenure, all for the purpose of discriminating against Sawicki because of her race and sex. MSU argues that the other officials who relied on the tainted record and recommendations were persuaded by the Chair and Dean that tenure should not be granted. (Br. Opp., pp. i, 1-3) But that agreement, far from showing that the Chair and Dean were innocent of any discriminatory purpose, merely demonstrates the effectiveness of their discriminatory conduct.

(2) Another petition raising the same issue as the instant case is now pending before the Court.[6] *BCI*

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that instance. (Pet. App. 6a). The record included a substantial body of laudatory statements about Sawicki from MSU students. (Pet. App. 8 n.3).

Respondents suggest that Sawicki had negative relations with several colleagues in her department. (Br. Opp. pp. i, 1-2). This assertion rests solely on declarations from college officials prepared, years after the denial of tenure, for this litigation. D.Ex. 67 (dated Feb. 7, 2005), D.Ex. 69 (dated Feb. 11, 2005). The contemporaneous records of the tenure decisionmaking process contain no reference to any such problem or concern. Aside from the Chair, no one in the tenure decisionmaking was even in Sawicki's department.

[6] The Question Presented in *BCI Coca-Cola* is as follows:

> Under what circumstances is an employer liable under federal anti-discrimination laws based on a subordinate's discriminatory animus, where the person(s) who actually made the adverse employment decision admittedly harbored no discriminatory motive toward the impacted employee.

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Coca-Cola Bottling Co. v. EEOC, No. 06-341. The brief in opposition in *BCI Coca-Cola* is due on December 8, 2006.[7] If the brief in opposition is filed on that date, the petition and response in *BCI Coca-Cola* will be distributed to the Court on December 20, 2006 for consideration at the conference of January 5, 2007.

The instant case provides a more appropriate vehicle for deciding the legal issue in question than does *BCI Coca-Cola*. *BCI Coca-Cola* is an interlocutory appeal, a circumstance which ordinarily militates against granting review. R. Stern, E. Gressman, S. Shapiro & K. Geller, Supreme Court Practice, 258-61 (8th ed. 2002) (citing cases). The petitioner in *BCI Coca-Cola* insists that the management decision to dismiss the worker involved was *not* caused by any action on the part of the assertedly biased lower ranking supervisor.[8] If petitioner is correct, it

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[7] The United States has asked for and received two 30-day extensions of time for the filing of this brief.

[8] Petitioner in *BCI Coca-Cola* contends that the higher ranking supervisor who actually made the disputed dismissal decision conducted an "independent investigation" of the relevant facts. (*BCI Coca-Cola* Petition, p. 5). Petitioner in *BCI Coca-Cola* also notes that

> [i]t is . . . undisputed that [the subordinate supervisor in that case] was never asked for his opinion as to what should happen [to the alleged discrimination victim], never recommended termination, and, in fact, never made any comments or suggestions at all other than asking [the higher ranking supervisor's] advice on how to handle the situation and reporting to her what had occurred.

(*BCI Coca-Cola* Petition, p. 3).

This situation contrasts with the undisputed facts of the instant case. In this case the higher ranking supervisors (the VPAA and President) concededly made no investigation of their own, had no direct knowledge of any of the relevant facts, and relied instead on the information and recommendation provided by the very lower level

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will prevail at trial regardless of how this Court resolves the extent of an employer's liability for discrimination by a lower ranking supervisor.

In light of the posture of these two cases, we urge that the Court at this time grant certiorari in the instant case. When the petition in *BCI Coca-Cola* comes before this Court, the Court should defer action on that petition pending the decision on the merits in the instant case. Should the Court proceed in this manner, we will consent to the filing of an amicus brief by BCI Coca-Cola, and (if the Solicitor General files a brief in support of petitioner Sawicki and so requests) will agree to a divided argument with the Solicitor General. Under Rule 37.4 of this Court, the Solicitor General will of course be entitled as of right to file an amicus brief in the instant case on behalf of the United States and the EEOC.

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officials (the Chair and Dean) whose allegedly discriminatory motives are the basis for petitioner Sawicki's appeal. (*Sawicki* Petition, pp. 3-6).

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the court of appeals. In the alternative, the Court should defer action on the petition until the conference at which the petition in *BCI Coca-Cola v. EEOC* is taken up for consideration.

Respectfully submitted,

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